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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

10 **Brian Whitaker**

11 Plaintiff,

12 v.

13 **JEG1 LLC**, a California Limited  
14 Liability Company,

15 Defendants.

16 **Case No.** 5:21-cv-03198-LHK

17 **Plaintiff's Qualified Non-**  
18 **Opposition to the Defense Motion**  
19 **to Dismiss Complaint**

20 **Date:** October 7, 2021

21 **Time:** 1:30 p.m.

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# MEMORANDUM OF POINTS AND AUTHORITIES

## **I.Preliminary statement**

JEG1 LLC's motion to dismiss fails to identify what authority it is moving for dismissal under. *See* Defense Motion (Docket Entry 10). However, its points and authorities cite both 12(b)(1) and 12(b)(6) standards. Neither JEG1 LLC's motion, nor its defense points and authorities, identify if a dismissal with prejudice or without prejudice is sought. *See* Docket Entries 10 & 10-1.

Nonetheless, the points and authorities argue that (1) the complaint fails to state a claim under 12(b)(6) and (2) that this court lacks jurisdiction because of failure to sufficiently allege deterrence. Neither argument has merit. Both arguments rely on extrinsic facts that are not appropriate in a 12(b)(6) motion and premature for a 12(b)(1) motion as it intertwines the substantive merits with the jurisdictional challenge.

Nonetheless, the defense raises a good argument and subsequent investigation has demonstrated a change in conditions at the JEG1 LLC's creamery that moots this case. Thus, plaintiff believes that the ADA claim should be dismissed due to mootness and the Court should decline to exercise supplemental jurisdiction over the state claim because the federal claim would be gone.

## **II. The Complaint is sufficiently pled**

A complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief,” and give “the defendant fair notice of what the . . . claim is and grounds upon which it rests” in compliance with Rule 8(a) of the Federal Rules of Civil Procedure. In order to determine whether a pleading contains the necessary allegations, a

1 party must understand what constitutes a viable claim under the cause of  
 2 action pled.

3 Here, the plaintiff's claims are based on Title III of the ADA. To  
 4 succeed on a Title III ADA architectural barrier claim, "a plaintiff must  
 5 show that: (1) he is disabled within the meaning of the ADA; (2) the  
 6 defendant is a private entity that owns, leases, or operates a place of public  
 7 accommodation; and (3) the plaintiff was denied public accommodations  
 8 by the defendant because of his disability." *Arizona ex rel. Goddard v.*  
 9 *Harkins Amusement Enterprises, Inc.*, 603 F.3d 666, 670 (9th Cir. 2010).  
 10 "The third element—whether plaintiffs were denied public  
 11 accommodations on the basis of disability—is met if there was a violation  
 12 of applicable accessibility standards." *Moeller v. Taco Bell Corp.*, 816  
 13 F.Supp.2d 831, 847 (N.D. Cal. 2011) *citing, Chapman v. Pier 1 Imports*  
 14 (*U.S.*) *Inc.*, 631 F.3d 939, 945 (9th Cir. 2011). This is because  
 15 discrimination is defined both as either a failure to ensure that alterations  
 16 are "readily accessible to and useable by persons with disabilities" and,  
 17 where there are no alterations, "a failure to remove architectural  
 18 barriers...in existing facilities...where such removal is readily achievable."  
 19 42 U.S.C. §§ 12183(a)(2); 12182(b)(2)(A)(iv).

20 Thus, the following is a simplified statement of the elements  
 21 necessary for the plaintiff to prove discrimination under this section:

- 22 1. Plaintiff must be disabled. 42 U.S.C. § 12182(a);
- 23 2. The defendants' facility must be a place of "public  
     24 accommodation" and, therefore, governed by Title III of the ADA  
     *Id.*;
- 25 3. The defendants must be responsible parties, i.e., owners,  
     operators, lessors or lessees. *Id.*;

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1           4. The defendants' facility must have either undergone an alteration  
 2           that did not comply with the access standards or contain an easily  
 3           removed barrier that the defendants failed to remove. 42 U.S.C. §§  
 4           12183(a)(2); 12182(b)(2)(A)(iv);  
 5           5. Plaintiff must have actually encountered this non-removed and  
 6           unlawful barrier. 42 U.S.C. § 12188(a).

7           As demonstrated by the table below, Plaintiff has made all the necessary  
 8           factual and legal allegations necessary to state a claim.

<b>Element</b>	<b>Fact Alleged</b>
1. Disability	“Plaintiff is a California resident with physical disabilities. He is substantially limited in his ability to walk. He suffers from a C-4 spinal cord injury. He is a quadriplegic. He uses a wheelchair for mobility.” (Complaint, ¶ 1).
2. Place of Public Accommodation	“Scoop Microcreamery is a facility open to the public, a place of public accommodation, and a business establishment.” (Complaint, ¶ 9).
3. Responsible Parties	“Defendant JEG1 LLC owned Scoop Microcreamery located at or about 203 University Ave, Palo Alto, California, in April 2021. Defendant JEG1 LLC owns Scoop Microcreamery located at or about 203 University Ave, Palo Alto, California, currently.” (Complaint, ¶¶ 2-3).
4. Barrier to Access	“Unfortunately, on the date of the plaintiff's visit, the defendants failed to provide wheelchair accessible dining surfaces in

1 2 3 4 5 6 7 8 9 10 11 12	<p>conformance with the ADA Standards as it relates to wheelchair users like the plaintiff.</p> <p>Scoop Microcreamery provides dining surfaces to its customers but fails to provide any wheelchair accessible dining surfaces . . .</p> <p>the defendants currently fail to provide wheelchair accessible dining surfaces”</p> <p>(Complaint, ¶¶ 10-14)</p>
13 14 15 16 17 18 19 20 21 22	<p>4. Readily Achievable Solutions</p> <p>“The barriers identified above are easily removed without much difficulty or expense. They are the types of barriers identified by the Department of Justice as presumably readily achievable to remove and, in fact, these barriers are readily achievable to remove. Moreover, there are numerous alternative accommodations that could be made to provide a greater level of access if complete removal were not achievable.” (Complaint, ¶ 19).</p>
23 24 25 26 27 28	<p>5. Personal Encounter or Deterrence</p> <p>“A problem that plaintiff encountered was the lack of sufficient toe and knee clearance under the outside dining surfaces for wheelchair users.”</p> <p>“These barriers relate to and impact the</p>

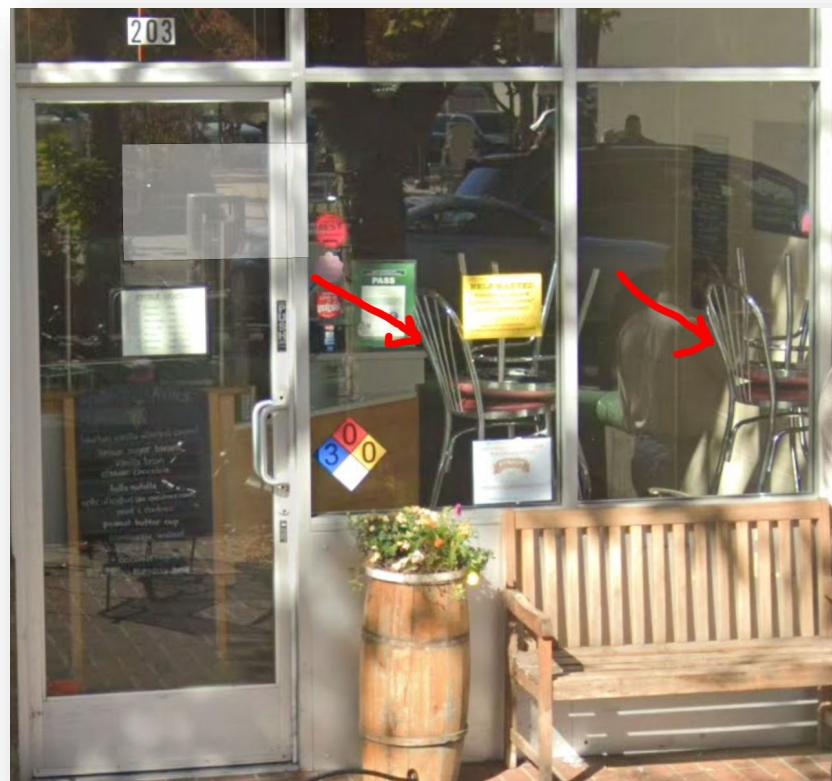
	<p>plaintiff's disability. Plaintiff personally encountered these barriers."</p> <p>"As a wheelchair user, the plaintiff benefits from and is entitled to use wheelchair accessible facilities. By failing to provide accessible facilities, the defendants denied the plaintiff full and equal access."</p> <p>(Complaint, ¶¶ 12, 15, 16).</p>
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Each of the required factual allegations have been made. The pleadings meet the liberal requirements of Rule 8. There is no basis to dismiss this complaint under 12(b)(6).

**III. The defendant's jurisdictional challenge on the basis of ownership is premature and improperly framed as a factual challenge under Rule 12(b)(1) and misunderstands the scope of the complaint allegations.**

The defense argues that this Court lacks subject matter jurisdiction and should dismiss the case. On its face, it is implausible that a district court would not enjoy subject-matter jurisdiction over a claim brought under the federal Americans with Disabilities Act. In fact, dismissal for lack of subject matter jurisdiction in a case premised on federal-question jurisdiction is "exceptional." *Sun Valley Gasoline, Inc. v. Ernst Enter., Inc.*, 711 F.2d 138, 140 (9th Cir. 1983). Here, defendant's "exceptional" challenge is merely an argument that it does not own or control the outdoor seating. As discussed below, this claim not only overlooks complaint allegations but is premature and would be improperly decided in a 12(b)(1) challenge.

1       First, the ADA claim is not restricted to outdoor seating. While  
 2 plaintiff personally encountered the outdoor seating, he complains about  
 3 the total lack of any accessible seating—whether indoor or outdoor. If this  
 4 case were to continue, the plaintiff would be prepared to prove that the  
 5 defendant’s facility offerED indoor seating and none of it was accessible to  
 6 wheelchair users:



21  
 22       Plaintiff’s ADA claim for injunctive relief is based on a failure “to  
 23 provide wheelchair accessible dining surfaces in conformance with the  
 24 ADA Standards as it relates to wheelchair users like the plaintiff.” *See*  
 25 Complaint, ¶ 10. Or, as pled more specifically, “When a business provides  
 26 facilities such as dining surfaces, it must provide accessible dining  
 27 surfaces. Here, accessible dining surfaces have not been provided in  
 28 conformance with the ADA Standards.” *See* Complaint, ¶ 24-25.

1       Thus, the defense evidence about who owns or controls the outdoor  
 2 seating is only relevant to a personal encounter claim and not for the  
 3 deterrence claims under either the ADA or Unruh. But it is improper to be  
 4 submitting declarations and arguing about location, ownership, control or  
 5 extent of accessible seating in a 12(b)(1) motion. While it is appropriate in  
 6 certain circumstances to bring a motion under Federal Rule of Civil  
 7 Procedure 12(b)(1) introducing extrinsic facts and challenging federal  
 8 court jurisdiction, it is not appropriate in the present case with the present  
 9 motion.

10       The problem with the defense motion is that the very question this  
 11 the defendant urges this Court to adjudicate—to determine jurisdiction—  
 12 goes right to the heart of the plaintiff's substantive claims. In this case,  
 13 plaintiff alleges that the defendant's dining surfaces and seating do not  
 14 comply with federal accessibility laws. If that is true, plaintiff can prevail  
 15 and obtain an injunction. If that is wrong, plaintiff loses. That is the case.  
 16 The ultimate question in this case is whether the defendant's facilities  
 17 comply with accessibility laws. The defendant, however, asks this Court to  
 18 answer that very question, i.e., determining ownership, control and  
 19 accessibility of its facilities, in determining whether it has jurisdiction. This  
 20 is improper.

21       The Ninth Circuit has cautioned that courts should not apply  
 22 Federal Rule of Civil Procedure 12(b)(1) when, as it is here, the issue of  
 23 jurisdiction is intertwined with the merits of a claim. *Sun Valley Gasoline*,  
 24 711 F.2d at 139-40; *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039  
 25 (9th Cir. 2004). As one court framed it: “The relatively expansive  
 26 standards of a 12(b)(1) motion are not appropriate for determining  
 27 jurisdiction in a case . . . where issues of jurisdiction and substance are  
 28 intertwined. A court may not resolve genuinely disputed facts where ‘the

1 question of jurisdiction is dependent on the resolution of factual issues  
 2 going to the merits.”” *Robert v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir.  
 3 1987) (internal cites omitted).

4 It is inappropriate and premature to require a plaintiff to prove up the  
 5 merits of his case at the pleading stage, just to prove jurisdiction:

6 [I]f the jurisdictional issue and substantive claims are so  
 7 intertwined that resolution of the jurisdictional question is  
 8 dependent on factual issues going to the merits, the district  
 9 court should employ the standard applicable to a motion for  
 10 summary judgment and grant the motion to dismiss for lack  
 11 of jurisdiction only if the material jurisdictional facts are not  
 12 in dispute and the moving party is entitled to prevail as a  
 13 matter of law . . . . Otherwise, the intertwined jurisdictional  
 14 facts must be resolved at trial by the trier of fact.

15 [*Rosales v. United States*, 824 F.2d 799, 803 (9th  
 16 Cir. 1987).]

17 Thus, “A district court may hear evidence and make findings of fact  
 18 necessary to rule on the subject matter jurisdiction question prior to trial,  
 19 *if the jurisdictional facts are not intertwined with the merits.*” *Rosales*, 824  
 20 F.2d at 803 (emphasis added).

21 It is true that a court normally not need accept the complaint  
 22 allegations as true when there is a *factual* attack on jurisdiction under Rule  
 23 12(b)(1). *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). But the  
 24 court must treat a factual attack under Rule 12(b)(1) differently “when the  
 25 issue of subject-matter jurisdiction is intertwined with an element of the  
 26 merits of the plaintiff’s claim.” *Leite*, 749 F.3d at 1122 n.3. This occurs  
 27 where the jurisdictional question “is dependent on the resolution of factual  
 28 issues going to the merits.” *Augustine v. United States*, 704 F.2d 1074, 1077  
 (9th Cir. 1983). Consider the case of *Johnson v. Hernandez*, where the  
 district court denied an almost identical defense motion. *Johnson v.*  
*Hernandez*, 69 F.Supp.3d 1030 (E.D. Cal. 2014).

1       In short, where the jurisdictional facts are intertwined with the  
 2 merits, a Rule 56 “summary judgment standard” applies. *Roberts*, 812  
 3 F.2d at 1177; *Careau Grp. v. United Farm Workers of Am., AFL-CIO*, 940  
 4 F.2d 1291, 1293 (9th Cir. 1991). The defendant can and should bring its  
 5 claims in the form of a Rule 56 motion. If plaintiff were not agreeing to a  
 6 dismissal for different reasons (mootness), plaintiff would respectfully  
 7 request this Court consider adopting the holding of the *Hernandez* court:

8       “*In ruling on a jurisdictional motion involving factual issues*  
 9 *which also go to the merits, the trial court should employ the*  
 10 *standard applicable to a motion for summary judgment ....*”  
 11 *Augustine*, 704 F.2d at 1077. Converting the instant Motion  
 12 to one for summary judgment would be premature because  
 13 Plaintiff has not yet had the opportunity to engage in  
 14 discovery and thus has not had the opportunity to develop the  
 15 evidence he may need to rebut Defendants’ “facts.”  
 16 Accordingly, Defendants’ Motion to Dismiss for lack of  
 17 jurisdiction is DENIED without prejudice to raising this  
 18 argument in a properly noticed and appropriately timed  
 19 motion for summary judgment.

20       [*Hernandez*, 69 F. Supp. 3d at 1035.]

21 **IV. Plaintiff’s subsequent investigation and consideration of**  
 22 **the defense arguments leads him to believe that the ADA**  
 23 **claim is moot. It should be dismissed and the Court**  
 24 **should decline to exercise supplemental jurisdiction over**  
 25 **the Unruh claim.**

26       The defense made two arguments in its brief that carry weight. First,  
 27 the defense argued that the City owns and controls the outdoor seating.  
 28 Second, the defense argued that it currently does not offer any indoor  
 seating. Plaintiff has investigated both claims and find that they have  
 probable merit. Certainly (after two subsequent investigations) it appears  
 that the defendant is no longer setting up eating inside the creamery. Thus,  
 plaintiff’s ADA claim is moot. He cannot, in good faith, argue that he will  
 encounter future discriminatory conditions. On that basis, he would be

1 remiss in arguing for this Court to maintain federal question jurisdiction  
2 given that the only remedy available under the ADA is injunctive.

3 Given that plaintiff concedes that the ADA claim has been rendered  
4 moot, and the early stage of this case (before any discovery has been done),  
5 plaintiff believes that this Court should not exercise supplemental  
6 jurisdiction over the Unruh claim but would not be bothered if the Court  
7 continued to exercise that jurisdiction.

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10 **V. Conclusion**

11 The plaintiff concedes, for the reasons stated above, that the ADA  
12 claim should be dismissed as moot.

13 Dated: September 16, 2021 CENTER FOR DISABILITY ACCESS

14  
15 By: /s/ Amanda Seabock

16 Amanda Seabock

17 Attorney for Plaintiff

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